IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1005

SIERRA CLUB AND CITIZENS FOR CLEAN AIR AND WATER,
Petitioners,

v.

ROGERS C. B. MORTON, Secretary of Interior, ET AL.,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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1. Both the government (Gov. Br. 2) and the utility companies (Utility Br. 1-4) contend that there is no reason for this Court to review the decision below because the United States now has use of 1,000 acres of marshland for wildlife-refuge purposes (the total of the land obtained from the utility companies and most of the land given to them) in comparison to only some 500 acres before the land exchange. However, the facts alleged in the amended complaint must be taken as true in reviewing the determination to dismiss it. The amended complaint alleged that the marsh given to the utility companies was an excellent wildlife refuge (para. 8); that construction of the nuclear power plant "would cause serious and permanent damage to the marsh areas and its ecological systems, thereby rendering the marsh largely unfit for migratory bird inhabitation" (para. 9); and that the discharge of radioactive materials from

the plant will cause serious damage to wildlife using the marsh (para. 10). The amended complaint further alleges that the marsh obtained by the federal government from the utility companies "is a wildlife refuge of extremely poor natural quality as compared to [the land given up]" (para. 18). In short, the facts as they come before this Court are that the federal respondents have surrendered an excellent wildlife refuge of over 500 acres and now have over 1,000 acres, none of which is suitable for this important purpose.

2. The government's principal contention in opposing certiorari (Gov. Br. 4) is that this case involves a transaction which occurred prior to enactment of the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, that NEPA will require the preparation of an environmental-impact statement for future land exchanges, and that therefore "the present case does not raise any issue of continuing general importance that warrants the attention of this Court." However, the preparation of an environmental-impact statement would have no relation to the present case. Even if impact statements are prepared in the future, they will only require consideration of various environmental factors. 42 U.S.C. 4332(2)(C). In contrast, petitioners contend that the statutes relied upon impose entirely separate substantive requirements relating to protection of the National Wildlife Refuge System. The issue whether suits under these statutes are barred by sovereign immunity will continue to be raised in the future despite the passage of NEPA.

3. The government's other reason for opposing certiorari is that the decision below is correct. As we showed in the petition, the decision below is in conflict with several decisions of this Court and the courts of appeals and the issues presented are of major importance to the administration of federal lands.

4. The utility companies claim (Utility Br. 8-9) that, even if a complaint alleges that a federal officer has acted unconstitutionally or beyond his statutory powers, sovereign immunity still bars suit if the action involves the disposition of federal property. However, the cases, upon which the companies rely, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, note 11 (1948), and *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963), state that this rule applies only as to "unquestionably sovereign property" and to "property admittedly belonging to the United States." Similarly, in *United States* v. *Lee*, 106 U.S. 196 (1882), this Court held that suit could be brought to recover property unconstitutionally taken by the United States. If this case does involve land obtained by the United States (contrary to our argument below that petitioners seek only to recover land divested by the United States), it is because this land was obtained pursuant to an exchange of land which was allegedly in violation of law. The property held by the United States is not unquestionably or admittedly federal property and sovereign immunity does not apply.

5. Petitioners seek only to have the property of the United States, which was exchanged in violation of federal statutes, returned to the United States. The utility companies (Utility Br. 9-10), citing ordinary equity principles, state that, if the United States recovered the land it gave up, it would be compelled to return to the companies the property it had acquired from them.

Ordinary law concerning rights to private land does not apply. Article IV, Section 3, clause 2 provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States * * *.

Numerous decisions of this Court have interpreted this clause to give Congress exclusive jurisdiction over the disposition of land or other property of the United States and to give no such power to the head of an executive agency without legislation by Congress. *E.g.*, *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 336 (1841); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941). Laches, estoppel, and other equitable doctrines do not apply when the agents of the United States take action concerning federal lands beyond the power conferred on them by Congress. *E.g.*, *Hart* v. *United States*, 95 U.S. 316, 318 (1877); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Wilber Nat. Bank* v. *United States*, 294 U.S. 120, 123-124 (1935).

Here, the utility companies attempt to invoke an equitable doctrine in order to prevent any judicial consideration of the issue whether federal officials have disposed of federal lands without authorization by Congress. In doing so, they cite only cases and other authorities relating to transactions between private parties or local governments. These principles, however, are not applicable to the federal government—particularly since the companies have a remedy in the Court of Claims (see Pet. 9).

In any event, even if equitable principles do apply to cases involving federal-land transactions, sovereign immunity still does not bar this action. Plaintiffs seek, as the government admits (Gov. Br. 3, note 2), only the recovery of land for the United States which was wrongfully disposed of by federal officials. It is the utility companies who are contending that equitable principles require the United States to return the land obtained from the companies. The companies' contention is in the nature of a cross-claim against the United States for recovery of their land if the companies are required to return the land they obtained from the United States.

The real sovereign-immunity issue is whether the companies' cross-claim is barred by sovereign immunity and whether their sole remedy is a suit for compensation in the Court of Claims. Regardless of the resolution of that question, petitioners are entitled to have the courts determine the separate issue whether the companies must return the land they obtained to the United States. Sovereign immunity cannot possibly apply to this action. Even if sovereign immunity is deemed to prevent suit against the United States, this claim can still continue to be maintained against the companies alone.

6. This Court has stated, in summarizing the purpose of the doctrine of sovereign immunity, that "[t]he Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 704. This is, like many land-exchange cases, clearly not a situation where the government will be stopped in its tracks if petitioners' obtain judicial review of the exchange. This transaction was initiated by the utility companies for their own purposes in order to obtain federal land they desired. If anyone will be stopped, it will therefore be the companies. Certainly, sovereign immunity was not designed to protect private parties from judicial determinations whether land came into their possession legally.[1]

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[1] As petitioners showed (Pet. 14-17), there is a square conflict of circuits between the decision below and the Courts of Appeals for the District of Columbia, Second, Fourth, Fifth, and Ninth Circuits as to whether the Administrative Procedure Act constitutes a complete or partial waiver of sovereign immunity. The utility companies have clearly not shown (Utility Br. 15-21) that the decisions are consistent. For example, while the utility companies (Utility Br. 19-20) assert that the Fifth Circuit supports their position that the Administrative Procedure Act does not waive sovereign immunity, the only case they cite is *Gardner* v. *Harris*, 391 F.2d 885 (C.A. 5, 1968), which did not arise under

CONCLUSION

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 1973

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that Act. The decision of the Fifth Circuit in *Estrada* v. *Ahrens*, 296 F.2d 690, 698 (1961), that the Act does constitute a Congressional waiver of sovereign immunity, therefore continues to be good law and is in direct conflict with the decision below.